Filed 8/31/06 Valente v. Unumprovident CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SUZANNE M. VALENTE,

Plaintiff and Appellant, **A110056**

v. **(San Francisco County Super. Ct. No. C03-419321)**

UNUMPROVIDENT CORPORATION et al.,

Defendants and Respondents.
_____/

Appellant Suzanne M. Valente, D.D.S., filed a complaint against her insurance company and its corporate successor-in-interest alleging they breached their contract and acted in bad faith when they failed to pay her disability claim. A jury agreed and awarded Dr. Valente over $1.1 million in damages and attorney fees. Dr. Valente now appeals claiming the trial court instructed the jury incorrectly on the issue of punitive damages. We agree and will reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dr. Valente graduated from dental school in 1981. She worked for other dentists for a few years, and then started her own practice in 1984. Shortly thereafter, Dr. Valente purchased the disability insurance policy that is at issue in this case.

The policy was issued by Paul Revere Life Insurance Company, now known as UnumProvident Corporation.[1] It insured Dr. Valente from disability due to injury or sickness. The policy contained a "Total Disability in Your Occupation" rider that insured Dr. Valente's ability to work specifically as a dentist. If Dr. Valente became disabled, but could work in an occupation other than dentistry, the policy would still provide coverage. In addition, the policy contained a "Future Income Option" rider that guaranteed Dr. Valente the option to purchase additional coverage in the future should her income rise.

Dr. Valente's practice flourished for many years. In late 1992, she began to experience health problems. The first problem was a ganglion cyst at the base of her right index finger. Repetitive hand activities can cause extra fluid to secrete and eventually, a balloon, or ganglion cyst, can develop. Dr. Valente's physician, Dr. Robert Mendle, treated the cyst with a series of cortisone injections. When those injections proved ineffective, the cyst was surgically removed in May 1995. The surgery left Dr. Valente with scar tissue and pain in the location of the surgery.

Shortly before the surgery, Dr. Valente began to experience pain in the fourth knuckle of her right hand. In addition, in October 1996, Dr. Valente began to experience pain in the area of her left thumb. She returned to Dr. Mendle who diagnosed the thumb problem as DeQuervain's syndrome. DeQuervain's occurs when the linings around the tendon become inflamed due to overuse.

Dr. Valente's hands did not improve so she went to see Dr. Mark Anderson. In March 1997, Dr. Anderson diagnosed Dr. Valente to be suffering from repetitive strain injury. He treated her with another steroid injection.

Dr. Valente returned to Dr. Anderson in June 1997. He noted she was still experiencing DeQuervain's and he treated her with another steroid injection and by placing her hand in a splint. In August 1997, Dr. Anderson noted that Dr. Valente's

---

[1] Paul Revere Life Insurance Company was purchased by Provident Companies, Inc. Provident then merged with Unum Corporation to form UnumProvident Corporation. For the remainder of this opinion, unless the context requires more specificity, we will refer to Dr. Valente's insurance company as UnumProvident.

DeQuervain's had not improved. He told her she "may well have to quit dentistry" if the condition did not improve.

In January 1998, Dr. Anderson held a long discussion with Dr. Valente in which he told her that the "handwriting was on the wall" and that she would "eventually have to give up dentistry." In a final attempt to save Dr. Valente's practice, he advised her to take one month off work to see if her hands improved. Dr. Valente followed her doctor's advice. When she returned to work, her hands became painful after only two days. Dr. Anderson believed the implication for Dr. Valente's practice was clear: "her hands are to the point where I don't think it is feasible for her to continue as a dentist. She has tried but it is just not going to work out. If she has to take one month off to have two good days I just don't see that being a reasonable situation and she will eventually get to the point where she can't use her hands much at all."

Dr. Valente sold her dental practice and then filed a claim under her disability insurance policy. The adjuster assigned to the claim asked a nurse to meet with Dr. Valente and Dr. Anderson. The nurse reported back to the adjuster that although Dr. Valente "loves dentistry," Dr. Valente did not believe she could return to work. The nurse also noted that Dr. Anderson said that Dr. Valente "will never return to dentistry."

After reviewing the report, the adjuster concluded Dr. Valente was "totally disabled from performing the duties of her occupation due to chronic pain in her hands."

Even though the adjuster had concluded Dr. Valente was "totally disabled" he recommended that she be placed under surveillance for three days. The surveillance did not disclose anything that undermined Dr. Valente's claim.

Hoping to limit its exposure, UnumProvident encouraged Dr. Valente to participate in vocational rehabilitation. Dr. Valente declined indicating she preferred to do volunteer work.

Shortly thereafter, the adjuster assigned to Dr. Valente's claim asked for an in-house medical review. That review was conducted by Dr. Nabil Malek. He concluded Dr. Valente's medical records did not reveal a documented impairment. Based on Dr. Malek's review, an independent medical exam (IME) was ordered.

The IME was conducted by Dr. Earl Fogelberg. He said he lacked the skills necessary to determine whether Dr. Valente was totally disabled.

After receiving Dr. Fogelberg's report, UnumProvident ordered a second three-day surveillance of Dr. Valente. Again, the surveillance failed to reveal anything that was inconsistent with her claim.

A second IME was conducted by Dr. Leonard Gordon. He concluded, based on a five to ten minute exam, that Dr. Valente was able to resume work as a dentist.

On February 14, 2001, UnumProvident sent a letter to Dr. Valente denying her claim because she had failed to offer "compelling proof" of a disability. The contract between Dr. Valente and UnumProvident requires only proof, not "compelling proof" of disability.

After receiving the denial, Dr. Valente and Dr. Anderson sent letters to UnumProvident pointing out what they believed to be deficiencies in Dr. Gordon's conclusion. UnumProvident declined to change its position. Dr. Anderson then sent a five-page letter to UnumProvident detailing inadequacies in Dr. Gordon's analysis.

Dr. Anderson spoke with Dr. Malek on May 7, 2001. They agreed a functional capacity evaluation (FCE) would be helpful in analyzing Dr. Valente's claim. However, the FCE was delayed several times and was not actually scheduled until the following October. Believing UnumProvident was using the FCE as a means to deny her claim, Dr. Valente declined to participate. Almost immediately, UnumProvident reaffirmed its decision to deny Dr. Valente's claim because she failed to offer "compelling proof" of a disability.

When UnumProvident denied Dr. Valente's claim initially, it told her she could appeal the decision by sending a request and supporting document to UnumProvident's Quality Performance Support Unit. On May 3, 2001, Dr. Valente sent a letter and supporting documentation to the Quality Performance Support Unit appealing her denial. UnumProvident never considered that appeal.

Based on these facts, and as is relevant here, Dr. Valente filed a complaint against Paul Revere and UnumProvident alleging causes of action for breach of contract and

breach of the covenant of good faith and fair dealing. The complaint sought compensatory and punitive damages.

The case proceeded to a jury trial where the parties presented the evidence we have set forth above. UnumProvident defended the complaint arguing it had correctly denied Dr. Valente's claim. UnumProvident acknowledged it made "mistakes"[2] but argued those mistakes were of a type that are inevitable in any large organization.

In an attempt to refute this argument, and to provide support for her request for punitive damages, Dr. Valente presented testimony from two former UnumProvident employees. The first was Mary Fuller who worked as a vice president for UnumProvident. Fuller testified that UnumProvident had a policy of pressuring its employees to terminate claims. Each week, department heads were asked to make termination projections. If those projected terminations were not high enough, Ms. Fuller was expected to go back to her unit and come up with a higher number of projected terminations.

Dr. Valente also presented testimony from Diane McGinnis, who worked as a customer care specialist for UnumProvident. McGinnis said that every month she was given a projected termination "goal." McGinnis believed that if she did not meet that goal, she would be fired. According to McGinnis, UnumProvident regularly closed down legitimate claims. "[T]ime and time again claimants who were ill, who had terminal cancer . . . [had] their benefits taken away from them." While working at UnumProvident, a superior told McGinnis that her "only job" was to "shut these F'ing claims down." The company even gave monetary bonuses to the representatives who shut down the most claims.

The jurors considering the evidence found in favor of Dr. Valente concluding

---

[2] One of the "mistakes" UnumProvident acknowledged was its processing of Dr. Valente's future income option (FIO) request. Dr. Valente applied for and received FIO increases in 1993, 1995 and 1997. However, when Dr. Valente applied for another increase in 1999, her request was denied. UnumProvident initially took the position that it had denied Dr. Valente's 1999 request correctly. Later during trial, UnumProvident acknowledged that its denial was a "mistake."

UnumProvident had breached its contract and the covenant of good faith and fair dealing. For these breaches, the jurors awarded Dr. Valente $1,143,793.33 in damages. The jurors declined however to award Dr. Valente punitive damages. Dr. Valente then filed the present appeal.[3]

II. DISCUSSION

A. Whether the Court Instructed the Jurors Correctly

Dr. Valente contends first and primarily that the trial court instructed the jury incorrectly on the issue of punitive damages.

The trial court instructed the jurors on punitive damages using CACI No. 3945 as follows:

"If you decide that defendants' conduct caused Dr. Valente harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and discourage similar conduct in the future.

"You may award punitive damages against defendants only if Dr. Valente proved that defendants engaged in that conduct with malice, oppression, or fraud. To do this, Dr. Valente must prove one of the following by clear and convincing evidence:

"1. That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of defendants who acted on behalf of defendants.

"2. That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of defendants; or,

"3. That one or more officers, directors, or managing agents of defendants knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred."

The court then defined the terms malice, oppression and fraud.

---

[3] UnumProvident has paid the judgment and it has not filed an appeal. In this case, we address only the punitive damage issue.

Thereafter, the court read special instruction 41 that had been prepared by UnumProvident. It stated as follows:

"*In deciding whether or in what amount to award punitive damages, you may consider only the specific conduct by defendants that injured Dr. Valente in this case*. You may not punish defendants for conduct or practices that did not affect Dr. Valente, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to the harm to Dr. Valente, if any." (Italics added.)

Dr. Valente contends the portion of special instruction 41 that we have italicized states the law incorrectly because it precluded the jurors from considering UnumProvident's conduct towards others when deciding whether to award punitive damages.

Special instruction 41 does state the law incorrectly. The instruction was based primarily on *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 (*Romo*), where the court interpreted recent United States Supreme Court decisions to mean that a punitive damage award must be based primarily on the defendant's conduct toward the plaintiff. (*Id.* at p. 749.) However, even the *Romo* court did not suggest that the defendant's conduct toward others was irrelevant when determining whether punitive damages are appropriate. To the contrary, the *Romo* court stated expressly, "this focus upon punishing defendant solely for the outrage inflicted upon the present plaintiffs is not an evidentiary limitation. Plaintiffs are still entitled to show similar conduct on the issue of reprehensibility." (*Id.* at p. 753, fn. 7.)

To the extent *Romo* can be interpreted as special instruction 41 suggests, it has effectively been overruled. Shortly after this case was tried, our Supreme Court decided *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 (*Johnson*). The *Johnson* court criticized the *Romo* decision for adopting an unduly narrow view of punitive damages. (*Id.* at p. 1206.) The court's holding in *Johnson,* is directly applicable here. "Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to

the plaintiff in isolation." (*Id.* at p. 1207.) ". . . [D]ue process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs." (*Id.* at p. 1204.)

Contrary to the statement made in special instruction 41, UnumProvident's conduct toward others was relevant to several factors to be considered in the punitive damage equation. For example, the court told the jurors they could award punitive damages if UnumProvident's conduct toward Dr. Valente exhibited characteristics of malice. The court then defined malice to mean that the "defendants acted with intent to cause injury . . . ." UnumProvident's conduct toward its other insureds, as described by its former employees Mary Fuller and Diane McGinnis, was relevant on the issue of intent. It tended to show that UnumProvident's claim adjusting errors were not simple mistakes as UnumProvident claimed, but were part of a company-wide effort to improperly deny legitimate claims.

Similarly, our Supreme Court has stated that "a civil defendant's recidivism remains pertinent to an assessment of culpability." (*Johnson, supra,* 35 Cal.4th at p. 1204, fn. omitted.) "By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature." (*Id.* at p. 1207, fn. 6.) The testimony from Fuller and McGinnis tended to show that UnumProvident's actions with respect to Dr. Valente were part of a company-wide policy that warranted punitive damages. (*Johnson, supra,* 35 Cal.4th at p. 1204.)

The court also told the jurors they could only award punitive damages if they found the acts of malice, oppression, or fraud at issue were "committed" "authorized" or "adopted" by an officer, director, or managing agent of UnumProvident. UnumProvident's conduct toward its other insureds as reflected in its company-wide pressure to terminate legitimate claims, would tend to show that the acts taken toward Dr.

Valente were committed, authorized or adopted by an officer, director, or managing agent of UnumProvident.

In sum, we conclude special instruction 41 stated the law incorrectly when it told the jurors that when deciding "whether or in what amount to award punitive damages, you may consider only the specific conduct by defendants that injured Dr. Valente in this case."

UnumProvident contends Dr. Valente waived the right to raise this issue because she asked the court to instruct with special instruction 41.

The court here assembled the instructions using a procedure that is used in many cases. The court and counsel discussed the instructions informally without a reporter being present. The court then went on the record and discussed the instructions to which an objection had been raised. One of the instructions identified through this process was special instruction 41. The relevant colloquy is as follows:

"[The Court] I'm inclined to give 41. I mean, that's exactly right. I can only -- they can only give punitive damages if it has to do with Dr. Valente.

"[Plaintiff's Counsel] Well, but they can award punitive damages to deter them – I mean, they've got to make a finding that with Dr. Valente they've committed malice, oppression, or fraud, but the amount of the punitive damages can be based on the fact that they're trying to deter them from doing it on similar claims.

"And I think what this is saying is that you can only award punitive damages for what happened to Dr. Valente, and that's really not accurate. You can only award punitive damages if you find malice, oppression, or fraud towards Dr. Valente, but in assessing the amount, you can take into account the deterrent effect that such an award should have.

"*But if you think you need to give that, Your Honor, I think maybe you should give that.*

"[The Court] I think I should give 41." (Italics added.)

UnumProvident interprets this passage as meaning that Dr. Valente encouraged the court to instruct with special instruction 41 and therefore that she cannot validly raise

the issue on appeal. We are unpersuaded. The record shows Dr. Valente objected to special instruction 41, explained the basis for her objection, and then submitted to the authority of the court. "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections . . . does not waive the error in the ruling by proceeding in accordance therewith . . . ." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

Next UnumProvident contends special instruction 41 was consistent with California law which only allows punitive damages when the defendant's conduct toward the plaintiff is malicious, oppressive or fraudulent. UnumProvident states the law correctly. Punitive damages are warranted only if the defendant's conduct toward the plaintiff evinces malice, oppression, or fraud. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1201.) The jurors in this case were so instructed, and Dr. Valente concedes the point. However, that is not what special instruction 41 states. The instruction incorrectly told the jurors that when deciding "whether or in what amount to award punitive damages, you may consider only the specific conduct by defendants that injured Dr. Valente in this case." In fact, the jurors validly could consider UnumProvident's conduct toward others for several purposes including whether UnumProvident's actions toward Dr. Valente were intentional, whether they were part of a company-wide policy that would justify punitive damages, and whether those actions were committed, authorized or adopted by an officer, director, or managing agent of UnumProvident.

Next, UnumProvident contends the jurors would not have understood special instruction 41 to preclude them from considering its allegedly wrongful corporate policies and practices when deciding whether to award punitive damages. UnumProvident bases this argument on the second sentence of special instruction 41 that states, "You may not punish defendants for conduct or practices that did not affect Dr. Valente, even if you believe that such conduct or practices were wrongful or deserving of punishment." According to UnumProvident, "the remainder of Special Instruction 41 made clear that the limitation in the first sentence was aimed at precluding the jury from 'punish[ing] defendants for conduct or practices that did not affect Dr. Valente' or for

'wrongdoing unrelated to the harm to Dr. Valente.' [] By implication, this language also made clear that 'conduct or practices' that *affected* Valente or were *related* to her injury *could* be considered as grounds for punitive liability." (Italics in original.)

We think UnumProvident has adopted an unreasonable interpretation of special instruction 41. The first sentence told the jurors that when evaluating whether to award punitive damages they could only consider "the specific conduct by defendants that injured Dr. Valente in this case." UnumProvident's conduct toward its other policyholders as described by Fuller and McGinnis would not have injured Dr. Valente and thus plainly would have been excluded. Nothing in the second sentence of the instruction negates the limitation clearly mandated by the first sentence. The instruction, read as a whole, was likely to have misled the jurors.

Finally, UnumProvident contends that a defendant's allegedly wrongful conduct toward others is only relevant when determining the amount of punitive damages, not a party's entitlement to such damages in the first instance. It bases its argument primarily on a quote taken from *Johnson, supra,* 35 Cal.4th 1191, where the court explained that a defendant's recidivism was relevant when determining how large a punitive damage award was justified, "To the extent the evidence shows the defendant had a practice of engaging in, and profiting from, wrongful conduct similar to that which injured the plaintiff, *such evidence may be considered on the question of how large a punitive damages award due process permits.*" (*Id.* at p. 1213, italics added.)

The language UnumProvident quotes plainly means that a defendant's conduct toward others is relevant when determining how large an award is justified. However, the court did not state nor did it imply that such conduct is *only* relevant when determining the amount of a punitive damage award. In fact, case law has long held that a defendant's conduct toward others is a relevant factor when determining whether punitive damages are justified. For example, in *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, the court affirmed a punitive damage award precisely because the defendant's conduct reflected a company-wide policy. "The jury could reasonably infer [that Blue Cross's claim adjusting activities] were all rooted in

established company practice. The evidence hence was sufficient to support a finding that the review process operated in conscious disregard of the insured's rights." (*Id.* at p. 847.) In *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, the court stated that a defendant's pattern and practices were critical when determining whether punitive damages are warranted, "A pattern or practice of wrongful conduct is often introduced as evidence of malice or oppression to justify a punitive damage award. [Citations.]" (*Id.* at pp. 820-821.) In *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 329, the court went so far as to state that "a central theme common to those cases which have sustained punitive damage awards is the existence of *established policies or practices* in claims handling which are harmful to insureds." (Italics in original.) We think if our Supreme Court had intended to overrule these cases and the long-standing principle articulated in them, it would have done so clearly.

B. Whether the Instructional Error was Prejudicial

Having concluded that the court instructed the jury incorrectly, we turn to the issue of prejudice. We must assess whether it is reasonably probable Dr. Valente would have obtained a more favorable result absent the error alleged. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570.) In making that determination, we look at several factors including (1) the degree to which evidence on the critical issue conflicts, (2) whether respondent's argument may have contributed to the instruction's misleading effect, (3) whether the jury requested a rereading of the instruction, (4) the closeness of the jury's verdict, and (5) the effect of other instructions in remedying the error. (*Id.* at pp. 570-571.)

Here, the evidence was flatly contradictory. Dr. Valente presented testimony from Fuller and McGinnis who testified that UnumProvident had a policy of pressuring its employees to terminate valid claims. UnumProvident, by contrast, presented testimony from claims adjusters who denied experiencing any such pressure.

While the jurors did not ask the court to reread special instruction 41, it is unlikely they needed to do so. The court referred the jurors to that instruction no less than five

times during Dr. Valente's final argument. Indeed, when counsel for Dr. Valente tried to argue to the jurors that UnumProvident was using its claims adjusting procedures to create profits, and was doing so "on the backs of people who have cancer, people who have repetitive stress injures, people who have MS," the court interrupted on its own motion to remind counsel, "to bear in mind the instructions that were given, please." During the subsequent recess UnumProvident objected and moved for a mistrial. The court denied the mistrial motion, but struck the argument and reinstructed with special instruction 41.[4] The court interposed a similar admonition to Dr. Valente's counsel and the jury four more times during appellant's opening and closing argument, while also reminding the jurors of special instruction 41 when sustaining UnumProvident's objections.

Additionally, it is likely UnumProvident's argument contributed to the instruction's misleading effect, at least to some extent. During his argument, counsel referred to the instruction indirectly when he told the jurors, "this policy about

---

4 The relevant colloquy is as follows:

"First of all, members of the jury, I'm going to read a portion of Mr. Whitehill's final argument. And after I read it, so you know what I'm reading, I'm going to strike it. It's going to be stricken, so you know what it is. It's going to be stricken, and you're to regard it as if it was never made. But in order to tell you what it is, I've got to read it first. I'm sorry about that, but that's what I have to do.

"And then I'm going to read you an instruction, and then I think it will be fairly clear from the instruction why I'm doing that. That's what I'm going to do. So I'm just reading a portion of Mr. Whitehill's final argument.

"'They set the corporate plan assumption at 108, you know, over industry average because they want to make money, and they're making the claims center their profit center, and they're doing it on the backs of people who have cancer, people who have repetitive stress injury, people who have MS.'

"Members of the jury, that portion of the argument is stricken. It's to be regarded as if it was never made. I'm going to read you an instruction now that I read you before.

"'In deciding whether or in what amount to award punitive damages, you may consider only the specific conduct by defendants that injured Dr. Valente in this case. You may not punish defendant for conduct or practices that did not affect Dr. Valente. Even if you believe that such conduct or practices were wrongful or deserving of punishment, the law provides other means to punish wrongdoing unrelated to the harm to Dr. Valente, if any."

encouraging claims people to terminate claims, it was admitted for a limited purpose, and I don't think you should consider it at all."

The jury ruled in favor of Dr. Valente on liability by 11 to 1 and 12 to 0 votes, but ruled 10-2 in favor of UnumProvident on punitive damages. These votes support reversal, given the presence of the other relevant factors. (See *Whiteley v. Phillip Morris, Inc.* (2004) 117 Cal.App.4th 635, 665.)

Finally, we find nothing in the other instructions that cured the prejudice created by special instruction number 41. Indeed, UnumProvident does not argue otherwise.

We conclude special instruction 41 was erroneous and it was prejudicial.[5]

III. DISPOSITION

The judgment is reversed and the case is remanded to the trial court for further proceedings on the issue of punitive damages. Appellant shall recover her costs on appeal.

_____

Jones, P.J.

We concur:

_____

Gemello, J.

_____

Reardon, J.*

*Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[5] Having reached this conclusion, we need not determine whether other related instructions were also erroneous and prejudicial. Furthermore, we need not address the evidentiary argument Dr. Valente has advanced.